

2009

Meadow Valley Contractors, Inc. v. State of Utah Department of Transportation : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

**MEADOW VALLEY CONTRACTORS,
INC.,**

**Plaintiff/Appellee and
Cross-Appellant,**

v.

**STATE OF UTAH DEPARTMENT
OF TRANSPORTATION,**

**Defendant/Appellant and
Cross-Appellee.**

Supreme Court No. 20090025-SC

**Appeal from Third Judicial District
Court, Honorable John Paul Kennedy,
District Court No. 050909139**

**APPELLANT'S REPLY BRIEF AND
RESPONSE BRIEF ON CROSS-APPEAL**

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**FILED
UTAH APPELLATE COURTS**

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Preliminary Considerations Dispositive of Issues on Appeal

A few undisputed facts are dispositive of the issues on appeal. Because the Utah Department of Transportation (UDOT) accepts—for purposes of appeal—that the UDOT engineer altered the paving project by prohibiting ribbon paving, UDOT raises only three issues: (i) whether Meadow Valley Contractors, Inc. (MVC), the general contractor, may recover damages incurred by Southwest Asphalt Paving, the subcontractor; (ii) whether UDOT breached the general contract with MVC by verbally altering the project where the contract contemplates UDOT altering the project; and (iii) whether MVC complied with notice provisions that are conditions precedent to MVC receiving additional compensation, and, if not, whether UDOT may enforce those provisions.

What complicates the analysis is the fact that MVC, and the trial court, insists upon referring to Southwest or MVC as “MVC/Southwest.” The analysis becomes straightforward, however, when Southwest and MVC are treated as separate entities, which MVC admits they are. MVC is a plaintiff and party to the general contract with UDOT. (Resp. Br. at 6.) Southwest is the assignee of MVC’s claims, but is neither a party to this lawsuit nor a party to the general contract with UDOT. (Id. at 10.)

With Southwest and MVC properly distinguished, a few facts become dispositive. First, Southwest incurred all damages; MVC incurred none. (Id. at 28.) In fact, after UDOT denied MVC’s belated request for additional compensation, MVC signed a “final estimate” in which MVC agreed that UDOT had paid MVC all compensation due under the contract.¹ (Trial Ex. 41.) Second, MVC’s Rule 30(b)(6) representative testified that

¹ “Has Meadow Valley been paid the full amount that was due and owing by UDOT under the contract? I believe so.” (R. 1424:691.)

MVC (i) did not believe the UDOT engineer had altered the project² and (ii) never provided UDOT notice of any kind, written or verbal, that MVC believed the UDOT engineer had altered the project.³ (R. 1424:553-54.) Finally, MVC’s representative testified that MVC understood MVC’s compliance with the notice provision was a condition precedent to receiving additional compensation, and therefore, UDOT could not have caused MVC to understand otherwise.⁴ (R. 1424:552-55.)

Therefore, according to MVC—the plaintiff—(i) MVC did not believe the UDOT engineer had altered the project by prohibiting ribbon paving; (ii) MVC never provided UDOT notice that the engineer had altered the project; (iii) MVC was aware that providing UDOT notice was a condition precedent to receiving additional compensation; and (iv) MVC incurred none of the damages awarded to MVC in this lawsuit.

Summary of the Argument

MVC’s response brief confirms that MVC is asking this court to change Utah law applicable to construction contracts. This court should reject MVC’s arguments not only because they are contrary to Utah law but also because they reflect bad public policy.

First, MVC argues that it can recover damages incurred only by Southwest. Adopting MVC’s position would require this court to overrule recent precedent holding that the assignee of a claim (here, Southwest) may not recover its own damages, but only

² Even after the project, MVC forwarded Southwest’s claim that UDOT had altered the project “without taking any position on whether the claim was valid or whether [MVC] agreed with it.” (R. 1424:525.)

³ “At any time during the paving project did you have an understanding that Meadow Valley was initiating a contract dispute or the contract claim provisions under the contract? No.” (R. 1424:552.)

⁴ “And is it your understanding that Meadow Valley was required to promptly notify the engineer of any alleged changes to the contract? Yes.” (R. 1424:552.)

those damages incurred by the assignor (here, MVC). MVC articulates nothing unique about this case that warrants ignoring that precedent. When MVC assigned its claim to Southwest, Southwest waived any claim against MVC for additional compensation, and therefore, it is irrelevant whether Southwest ever had a colorable claim against MVC.⁵ At the time MVC filed this lawsuit, it had suffered no damages, or at least none of the damages it was awarded by the trial court. This issue is dispositive.

Second, MVC argues that UDOT breached the general contract with MVC when the UDOT engineer verbally altered the project, even though the contract expressly contemplates that the UDOT engineer could alter the project verbally as conditions demanded. Adopting MVC's position would invalidate such contract provisions, which appear in every UDOT contract to permit engineers to order whatever work is necessary. This issue alone is dispositive because the trial court found in favor of contract ruling that UDOT breached the contract when its engineer verbally altered the project.

Third, MVC argues that Southwest's verbal complaints that the construction project would cost more than Southwest had anticipated when it submitted its bid to MVC satisfied MVC's obligation to provide written notice that MVC believed UDOT had altered the project. Adopting MVC's position not only could invalidate written notice requirements, but also would invalidate any requirements that notice be provided by a contracting party. The notice provisions in UDOT contracts are important because they allow UDOT to review any contention that its engineer has altered a project at a time

⁵ In fact, Southwest did not have a colorable claim because it is undisputed Southwest failed to comply with the notice provisions in its subcontract with MVC, something that operated to waive any claim to additional compensation: "Failure to so notify [MVC] will constitute a waiver of all such claims" (Add. C to Opening Br., Trial Ex. 9 § 5.3.)

UDOT can (i) determine whether the cost of additional compensation outweighs the benefits of altering the project and (ii) obtain federal government approval if additional costs will exceed \$25,000. Here, MVC's failure to provide UDOT any notice denied UDOT the opportunity to review the engineer's alteration or to obtain federal government approval before the project began. This issue also is dispositive because MVC's failure to comply with the notice provisions operates as a waiver of additional compensation.

Fourth, MVC argues that UDOT waived, modified, or is estopped from enforcing the notice provisions in the general contract because the UDOT engineer verbally prohibited Southwest from ribbon paving months before, and during, the project. This argument remains puzzling. It is the UDOT engineer's altering the project that triggers the contractual notice requirements; his altering the project cannot also excuse the need to comply with the contractual notice requirements.

For all of these reasons, the trial court erred when it (i) ruled that UDOT breached the general contract by doing something contemplated in the contract; (ii) awarded MVC damages that MVC did not incur; and (iii) excused MVC's failure to provide UDOT with any notice required under the contract based upon the actions of a third party, Southwest. The only way these rulings make sense is if MVC and Southwest are the same entity, which explains why MVC refuses to refer to itself separately in its response brief and instead uses the term "MVC/Southwest" throughout. MVC and Southwest are not the same entity, something that undermines nearly every argument MVC makes in the response brief and nearly every ruling made by the trial court.

This court not only should vacate the judgment entered by the trial court, but also should remand with instructions to enter judgment in favor of UDOT.

Argument

This appeal presents three dispositive issues. First, MVC is attempting to recover damages incurred by a separate entity—Southwest—something plainly prohibited under Utah law. Second, the only breach of contract theory is that the UDOT engineer breached the contract by verbally altering the project, but the contract expressly contemplates that the engineer could alter the project verbally. Third, assuming the engineer altered the project—something UDOT accepts for purposes of appeal—MVC failed to comply with the contractual notice provisions that are conditions precedent for MVC to receive any additional compensation stemming from the alterations.

I. MVC Cannot Recover Damages It Did Not Incur

In the opening brief, UDOT argued that the trial court committed plain error in awarding MVC damages it did not incur. (Opening Br. at 24-28.) More specifically, UDOT cited a recent decision of this court holding that an assignee of a claim, in this case Southwest, cannot recover its own damages in prosecuting an assigned claim, but instead may recover only damages incurred by the assignor, in this case MVC. SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., 2001 UT 54, ¶ 30, 28 P.3d 669 (“because SME’s implied warranty claim is an assigned claim, SME may not recover the damages it suffered”). Because the trial court awarded MVC damages incurred by Southwest, this court should vacate the judgment entered in favor of MVC.

In response, MVC does not cite, let alone address, SME. Instead, MVC first asserts that MVC incurred the damages awarded by the trial court because MVC was ultimately responsible for performing the paving work under its contract with UDOT. (Resp. Br. at 27.) On the next page of the response brief, however, MVC admits, as it

must, that MVC did not incur those damages because it “passed along the loss to Southwest”⁶ pursuant to its subcontract, by which MVC made Southwest responsible for performing the paving work. (Resp. Br. at 28.) After conceding that MVC did not incur the damages awarded by the trial court, MVC argues that MVC nonetheless was harmed because absent the assignment of MVC’s claims to Southwest, “MVC and Southwest would have litigated the issue of extra costs between each other.” (Resp. Br. at 29.)

Of course, “would have litigated” is not the same as “did successfully litigate,” especially where Southwest and MVC agreed that the assignment would “resolve all aspects of the Block Paving Claim as between [Southwest] and MVC in connection with the Project.”⁷ (R. 1184.) Specifically, MVC represented that “[b]y executing this [assignment], MVC does not acknowledge responsibility for any such claim of [Southwest] or acknowledge that such request is valid or timely.” (R. 1184.) Therefore, assuming MVC ever had liability stemming from the prohibition on ribbon paving—which it did not—by the time MVC filed this lawsuit, all liability had been extinguished.

Recognizing that problem, MVC ultimately relies upon a policy argument: “if UDOT’s theory on this point was adopted, it would have the effect of nullifying virtually all liquidating agreements entered into between general contractors and subcontractors, and prevent subcontractors from bringing actions on behalf of general contractors against owners.” (Resp. Br. at 30.) Apart from failing to distinguish SME, this argument

⁶ In fact, Southwest did not even do that with additional costs related to paving because MVC never incurred any losses to “pass along.” Instead, Southwest directly incurred any additional costs associated with the paving. What MVC “passed along” were fines and penalties UDOT assessed to MVC and MVC “passed along” to Southwest.

⁷ UDOT did not reference the assignment in the opening brief because it was discussed but not admitted at trial. UDOT references it here because MVC refers to the assignment in the response brief. A copy of the assignment is attached at Addendum 1.

assumes that all contractors must do what MVC and Southwest did in this lawsuit. That assumption is incorrect.

First, as MVC concedes, “Southwest could have brought suit directly against MVC for the damages,” which in turn would have prompted MVC to file its claim against UDOT, thereby placing all relevant parties before the court.⁸ (Resp. Br. at 23.) Southwest did not “bring suit directly against MVC” because Southwest’s failure to comply with the notice requirements in the subcontract meant that its claim against MVC would fail as a matter of law. Under the subcontract, Southwest’s “[f]ailure to so notify [MVC] will constitute a waiver of all such claims.” (Add. C to Opening Br.; Trial Ex. 9 § 5.3.)

Second, even if Southwest’s claim against MVC would not have failed as a matter of law, its claim was extinguished in the assignment agreement before MVC filed this lawsuit against UDOT. (Add. 1.) And in the assignment, MVC expressly refused to acknowledge that Southwest’s claim against MVC “is valid or timely.” (R. 1184.) Thus, the actions of MVC and Southwest extinguished any claim MVC had against UDOT; it was not extinguished by some defect in Utah law. As the trial court recognized, by the time of trial “[w]hatever the outcome, they [MVC] were covered. They didn’t care,” and

⁸ Had Southwest complied with the notice provisions in the subcontract, then MVC would have been contractually obligated to pursue a timely claim with UDOT. (Add. C to Opening Br., Trial Ex. 9 § 5.2.) Such provisions are common and allow subcontractors to obligate general contractors to pursue claims and avoid just the circumstances here. 3 Bruner and O’Connor on Construction Law § 8:51 (explaining that contractors are “incorporating language in the agreement that obligates the general contractor to present the subcontractor’s claims to the government” to avoid the holding of Severin v. United States, 99 Ct. Cl. 435 (1943) that if a general contractor has no liability to a subcontractor, the owner has no liability to the general contractor). Here, it is undisputed that Southwest failed to comply with the notice provisions in the subcontract and MVC failed to comply with the notice provisions in the general contract.

they “did not have a dog in this fight.” (R. 1425:993-94; 1424:574.) MVC’s policy argument is beside the point.⁹

Finally, MVC argues that this court should not reach this issue under a plain error standard. Because the error exists and was harmful to UDOT (no damages but for the error), the only issue is whether it “should have been obvious to the trial court” that MVC could not recover Southwest’s damages where UDOT pointed out to the trial court that (i) the damages presented at trial were incurred only by Southwest and (ii) Southwest is not a party. State v. Ross, 2007 UT 89, ¶ 17, 174 P.3d 628. Under Utah law, an error is obvious when “the law governing the error was clear at the time the alleged error was made.” State v. Dean, 2004 UT 63, ¶ 16, 95 P.3d 276. Here, at the time of trial Utah law was clear that an assignee cannot recover its own damages when prosecuting an assigned claim. SME, 2001 UT 54, ¶ 30. UDOT has thus satisfied the elements of plain error.

Furthermore, as UDOT pointed out in the opening brief (Opening Br. at 27-29), given the issues UDOT did raise before the trial court, the trial court should have recognized it was inappropriate to award MVC damages incurred by Southwest. State v.

⁹ If MVC had admitted liability to Southwest in the assignment instead of expressly denying it, then MVC may have had standing to recover damages. In jurisdictions that recognize “liquidation agreements” between general contractors and subcontractors, the general contractor (MVC) must admit liability to the subcontractor (Southwest) to provide a legal basis to recover damages from the owner (UDOT). Interstate Contracting Corp. v. City of Dallas, 135 S.W.3d 605, 610 (Tex. 2004) (“In a liquidation agreement: (1) the contractor acknowledges its liability to the subcontractor, thereby providing the general contractor with a basis for legal action against the owner; (2) the general contractor’s liability is liquidated to the extent of its recovery against the owner; and (3) the general contractor agrees to pass its recovery to the subcontractor.”) (emphasis added); Roof-Techs Int’l v. State, 57 P.3d 538, 552 (Kan. Ct. App. 2002) (general contractor must “acknowledged its liability” in liquidation agreement); Barry, Bette & Led Duke, Inc. v. New York, 240 A.D.2d 54, 57 (N.Y. App. Div. 1998) (“Absent a showing of actual contractual liability in claimant, there can be no liquidating agreement.”).

Eldredge, 773 P.2d 29, 35 (Utah 1989) (obviousness can also be shown by what the trial court knew at the time of the rulings).

This court should reaffirm that an assignee cannot recover its own damages when prosecuting assigned claims, especially where the assignor (MVC) has denied any liability to the assignee (Southwest) that could conceivably have served as a basis to combine the assignee's damages with the assignor's cause of action. Here, the trial court's error in awarding MVC damages incurred by Southwest should have been obvious in light of SME. This court should vacate the judgment in favor of MVC.

II. UDOT Could Not Breach the Contract By Altering the Project Because the Contract Contemplates That UDOT Can Alter the Project

The trial court also erred in ruling that UDOT breached the general contract when the UDOT engineer verbally altered the project to preclude ribbon paving. In short, that ruling is incorrect as a matter of law because the contract expressly contemplates that the UDOT engineer can alter the project. (Opening Br. at 29-30.)

In response, MVC claims that (i) UDOT waived this issue by failing to raise it in the trial court; (ii) the contract permitted UDOT to alter the project only via "written changes;" and (iii) the trial court, in fact, ruled that UDOT breached the general contract by refusing to pay additional monies to MVC, not simply by altering the project. (Resp. Br. at 32-36.) Each of these claims fails.

First, UDOT raised the argument in its trial brief and during closing arguments by citing contract provisions that allowed the UDOT engineer to change the project, which, in turn, triggered MVC's obligation to provide notice that it believed the UDOT engineer had materially altered the project. (R. 1274; see also 1425:1011.) The specific contract

provision is section 1.7(A). This section is titled “Notification of Differing Site Conditions, Changes and Extra Work” and provides that MVC must “[p]romptly notify the Engineer of alleged changes to the Contract due to differing site conditions, extra work, altered work beyond the scope of the Contract, or actions taken by the Department that change the Contract terms and conditions.” (Add. C to Opening Br.; R. 1274.) UDOT argued in the alternative that if the UDOT engineer altered the project—something UDOT accepts for purposes of appeal—then MVC waived any claim to additional compensation by failing to comply with the notice provisions, an argument that presupposes UDOT did not breach the contract by altering the project. (R. 1274-76.)

Second, the contract does not contemplate only written changes to the project. There are two provisions that govern changes. Section 1.5(A) provides that “[t]he Engineer reserves the right at any time during the work to make written changes in quantities and alterations in the work that are necessary to satisfactorily complete the project.” (Add. C to Opening Br. (emphasis added).) UDOT does not need MVC to provide UDOT notice of such changes because UDOT is aware of the change when it provides written notice. In contrast, section 1.7(A) provides that MVC must “[p]romptly notify the Engineer of alleged changes to the Contract due to differing site conditions, extra work, altered work beyond the scope of the Contract, or actions taken by the Department that change the Contract terms and conditions.” (Id.)

The only sensible reading of section 1.7(A) is that the engineer may, without complying with the written notification requirement in section 1.5(A), change site conditions, order extra work, or alter the work described in the contract. Section 1.5(A) governs changes the engineer knowingly and deliberately makes to the contract, whereas

section 1.7(A) governs changes the engineer makes to the project where, as here, the engineer does not believe he has altered the project through his verbal directions to contractors. This explains why (i) any change governed by section 1.7(A) is described as an “alleged” change, (ii) MVC must “[i]mmediately notify the Engineer verbally of the alleged change or extra work,” and (iii) MVC must then provide additional information “within 5 calendar days.” (Add. C to Opening Br.) None of these provisions govern a written change under section 1.5(A), the only type of change that must be in writing.

Third, the trial court did not rule that UDOT breached the general contract by failing to pay additional compensation. Instead, the trial court ruled that the breach was the UDOT engineer’s altering the project. The trial court’s rulings are as follows:

UDOT’s decision to prohibit ribbon paving where it would result in a greater than two inch vertical separation grade interfered with the method and means by which the asphalt paving should have been allowed to be performed by Meadow Valley/Southwest and constitutes a material breach of the contract by UDOT.

UDOT breached its contract with Meadow Valley in directing Meadow Valley/Southwest not to use the ribbon style method on portions of the Project.

UDOT breached its contract with Meadow Valley in misinterpreting and misapplying the asphalt paving specifications.

(R. 1519 (emphasis added).) The fact that the trial court awarded damages as a result of the alleged breach does not transform the breach of contract theory into one that UDOT breached the contract by failing to pay additional compensation.

Perhaps recognizing this problem, MVC relies upon a policy argument, which demonstrates the opposite of what MVC supposes: “If the Court were to accept UDOT’s logic that UDOT would not breach the contract because the contract allows UDOT to

alter/change the Project, then UDOT would be able to make changes/alterations in all of its projects (involving the same contract language UDOT cites [section 1.7(A)]) and be under no obligation to pay for any increased costs due to the changes/alterations.” (Resp. Br. at 36-37.)

Were MVC correct, section 1.7 would provide UDOT immunity in altering the project, but, of course, section 1.7 does no such thing because the section does not end at 1.7(A). Instead, section 1.7 provides that MVC may be entitled to additional compensation if MVC provides UDOT (i) notice of the alleged change, (ii) information about additional costs, and (iii) an opportunity to determine whether the change was worth the additional costs. Had MVC complied, its theory would have been that UDOT breached the contract by failing to pay MVC for additional work. Instead, MVC did not comply with the notice provisions, so the trial court ruled that the UDOT engineer breached the contract by altering the project. The policy argument is a red herring.

In the end, the only breach of contract theory in play is that UDOT breached the contract when the UDOT engineer altered the project. Because this theory fails as a matter of law, the trial court erred in ruling otherwise. This court should reverse.

III. MVC Waived Any Claim to Additional Compensation by Failing to Comply With the Notice Provisions and Dispute Resolution Procedures

A third ground for vacating the judgment entered in favor of MVC is that, even if (i) MVC were seeking its own damages and (ii) the UDOT engineer had altered the project by prohibiting ribbon paving, MVC nonetheless waived any right to additional compensation by failing to provide UDOT timely notice that it considered the engineer’s prohibition on ribbon paving to constitute a material alteration of the project that

warranted additional compensation. In the opening brief, UDOT pointed out that MVC—the plaintiff and only other party to the general contract—provided UDOT no written or verbal notice, a failure that operated as a waiver of any claim to additional compensation. (Opening Br. at 30-35.) Consistent with this, the trial court found that MVC failed to comply “strictly” with these notice provisions.¹⁰ (R. 1511.)

In response, MVC argues that UDOT had adequate verbal notice from Southwest to satisfy MVC’s written notice obligation. In essence, MVC argues that verbal notice is an adequate substitute for written notice under Utah law. (Resp. Br. at 37.) While UDOT contends that a sophisticated party like MVC cannot satisfy an express provision that requires immediate verbal, and within 5 days detailed written, notice by providing only verbal notice, this court need not reach that issue. What MVC does not address, but what is dispositive, is that MVC never provided any notice, written or verbal. Instead, the only entity that disputed the engineer’s interpretation of the project was Southwest, and under the general contract MVC had to provide UDOT written authorization to deal directly with Southwest with regard to changes in the contract price, something MVC never provided. (R. 1424:528.)

In the end, because MVC testified that it did not believe the UDOT engineer altered the project, MVC could not have notified UDOT that it believed the engineer

¹⁰ The general contract is clear concerning the importance of the notice provisions: (i) MVC’s “failure to provide required notice under this article constitutes a waiver of any and all claims that may arise as a result of the alleged change;” (ii) UDOT “does not grant additional compensation if verbal and/or written notification is not given;” and (iii) full compliance with the notification requirements “is a contractual condition precedent to the right to seek judicial relief.” (Add. B to Opening Br., Trial Ex. 103 at 57, 75, 78.)

altered the project.¹¹ And because MVC did not provide UDOT verbal or written notice,¹² MVC's discussion of under what circumstances a party can satisfy a written notice requirement with verbal notice is beside the point.

Moreover, in addressing the written notice requirement, the only case MVC relies upon—Thorn Construction Company, Inc. v. Utah Department of Transportation, 598 P.2d 365 (Utah 1976)—does not support its position. (Resp. Br. at 37-38.) As an initial matter, Thorn does not involve a third party's providing verbal notice to satisfy a contracting party's written notice requirement, the circumstance present here. In addition, in Thorn the UDOT engineer “agreed to pay [Thorn] for the extra expenses.” Id. at 369 (emphasis added). Thorn upheld a damage award for those expenses because the notice provision applied only to work “not clearly covered in the contract or not ordered by the engineer as extra work as defined herein.” Id. (emphasis added). The court held that the provision did “not contemplate the necessity of a written order in a case such as this, where the project engineer, not the contractor, causes extra work to be

¹¹ MVC has never disputed that UDOT's interpretation of the project. (R. 1424:539-40.) After the project, MVC merely forwarded Southwest's claim “without taking any position on whether the claim was valid or whether [MVC] agreed with it.” (R. 1424:525.) Throughout the project, MVC repeatedly and expressly refused to take any position on the matter. (Trial Ex. 16 at 1 (“UDOT specifications also dictate the vertical grade separation that will be allowed. The reason that you have been required to backup and pave in ‘blocks’ is to meet the contract requirements concerning vertical grade separation” and was “not due to [MVC's] direction.”); Trial Ex. 41; 1424:691 (a final estimate in which MVC agreed it had been paid all monies to which it was entitled).)

¹² MVC's Rule 30(b)(6) representative testified that MVC never provided UDOT notice that it considered UDOT to have altered the project. (R. 1424:553-54.) This explains why, to rule in MVC's favor, the trial court paradoxically had to find that UDOT and MVC witnesses “were not knowledgeable witnesses as it relates to . . . contract interpretation issues pertaining to the placement of asphalt paving.” (R. 1508.)

performed,” and UDOT was “on notice that additional compensation will be required.” Id. at 370. The notice provision in Thorn thus did not apply to the additional work.

In contrast, here (i) MVC did not inform UDOT that the work was “additional work,” (ii) UDOT did not agree “to pay for extra expenses,” and (iii) UDOT was not on notice that “additional compensation would be required” because the engineer did not believe he had altered the project (nor did MVC). And MVC concedes that it never provided UDOT notice that the engineer altered the project. (R. 1424:553-54.)

Thorn does not support the contention that Southwest’s verbal complaint that its costs would be more than anticipated in its subcontract bid¹³ constitutes MVC’s providing written notice that it believes the UDOT engineer materially altered the project such that additional compensation is warranted. The trial court erred in ruling that MVC had satisfied its contractual notice obligations.

IV. UDOT Did Not Waive or Modify the Notice Provisions; Nor Is UDOT Estopped from Enforcing the Notice Provisions

To avoid dismissing MVC’s claim on the ground that it failed to comply with the notice provisions, the trial court invoked a number of legal doctrines—waiver, modification, estoppel. The factual findings that purportedly support the trial court’s rulings involve interactions between UDOT and Southwest, not between UDOT and MVC. Again, the court’s rulings presuppose MVC and Southwest as the same entity, which they are not, a fatal flaw that not only pervades the trial court’s findings and

¹³ This characterization is not uncharitable. In the response brief, MVC characterizes the notice as Southwest interpreting the specifications differently prior to its bid with MVC: “Southwest based its bid on the premise that it would be allowed to utilize the ribbon style method of paving throughout the entire I-215 Project.” (Resp. Br. at 3.)

MVC's arguments in the response brief, but leaves the arguments difficult to understand, difficult to frame, and therefore difficult to address.

Before discussing the various legal doctrines, it is worth keeping in mind the relevant timeline UDOT set forth in the opening brief, which MVC does not dispute. (Opening Br. at 36-37.) On June 12, 2003, the UDOT engineer informed MVC and Southwest that ribbon paving was not permitted. Under the subcontract, Southwest had to provide MVC written notice within 48 hours—by June 14, 2003—that it believed this altered the project to obligate MVC, in turn, to provide similar notice to UDOT. Under the general contract, MVC had to provide UDOT written notice of the alteration within 5 days—by June 17, 2003—to avoid waiving any right to additional compensation. Thus, the events relevant to waiver, modification, or estoppel must have occurred prior to June 17, 2003, or must have retroactive effect, neither of which is supported by the findings of fact in this case.

A. UDOT Did Not Waive MVC's Notice Obligations

In the response brief, MVC defends the trial court's waiver rulings on 4 grounds. First, MVC argues that UDOT "acted in a manner inconsistent with its contractual rights by orally responding to [Southwest's] complaints regarding paving methods and by dealing informally and directly with Southwest personnel on paving methods issues instead of dealing directly with MVC." (Resp. Br. at 44.) If what MVC means by "orally responding" is consistently declining Southwest's requests to ribbon pave, then the UDOT engineer "orally responded," but this fact has no legal significance. (R. 1520.) When the UDOT engineer prohibited Southwest from ribbon paving, (i) the engineer

believed the prohibition was consistent with the project specifications, (ii) Southwest believed it was inconsistent with the specifications, and (iii) MVC took no position.¹⁴

Under these circumstances, the engineer's verbal prohibition triggers Southwest's obligation to provide notice to MVC; the prohibition could not have waived Southwest's obligation to provide notice to MVC or waived MVC's obligation to provide notice to UDOT. An event that triggers a contractual obligation to provide notice cannot also extinguish that contractual obligation to provide notice.

Second, MVC argues that "UDOT created an informal non-threatening atmosphere where it attempted to informally resolve paving disputes directly with Southwest." (Resp. Br. at 44.) Assuming that denying Southwest's requests to ribbon pave could create an "informal atmosphere,"¹⁵ such an atmosphere was specifically contemplated in the general contract, which encouraged a "volunteer partnering" relationship among UDOT, MVC, and Southwest, but stated that this relationship "does

¹⁴ This undermines MVC's contention that "there was clearly a dispute as to what methods of paving the contract allowed for." (Resp. Br. at 44.) If by "dispute," MVC means Southwest disagreed with the UDOT engineer that the contract specifications prohibited ribbon paving, then there was a dispute. However, the dispute was not between UDOT and MVC, as MVC admits that it never communicated to UDOT that it disagreed with the engineer's interpretation of the project.

¹⁵ The specific finding of fact is: "By dealing directly with Southwest personnel on paving issues, including methods of paving, and verbally directing Southwest on what methods of paving to utilize on the Project, UDOT created an informal, nonthreatening atmosphere on the I-215 Project in that it attempted to informally resolve paving disputes directly with Southwest without requiring strict compliance with contractual notice provisions (i.e., verbally directing Southwest to continue block paving when notified of the impacts instead of requiring that a written claim be made)." (R. 1512.)

The evidentiary support for an "informal atmosphere," articulated in numbered paragraphs 14 to 29 in the response brief (pages 8-11) recites everything UDOT did to create this atmosphere, and these paragraphs contain nothing more than UDOT "verbally directing Southwest on paving issues." As for MVC, at most "MVC's Project Superintendent, witnesses some of these conversations." (Resp. Br. at 11.)

not relieve either party from any of the terms of the Contract.” (Add. B, Trial Ex. 103 at 52.) MVC does not address this provision in the response brief, but the provision is dispositive.

Moreover, because the creation of any “informal atmosphere” occurred after June 17, 2003—the date by which MVC had to comply with the notice provisions—the atmosphere could not have induced MVC to fail to comply with the notice provisions. The atmosphere also could not have lulled MVC into believing that it need not comply with the notice provisions because, as MVC conceded at trial, it knew it had to comply with the notice provisions.¹⁶ In other words, just as MVC could not have provided notice that it believed the engineer altered the project because MVC did not believe the engineer altered the project, MVC could not have been induced into believing it need not comply with the notice provisions because MVC knew that it had to comply with the notice provisions. The findings of the district court concerning Southwest do not support its rulings that UDOT waived its right to enforce the notice provisions against MVC.

Third, MVC argues that “UDOT misrepresented to Southwest” that UDOT had not permitted ribbon paving on other projects. (Resp. Br. at 45.) While this misrepresentation could conceivably have relevance to whether the project specifications prohibited ribbon paving, it is difficult to understand what relevance it has to the notice provisions. What MVC and the trial court never explain is (i) how such a representation to Southwest constitutes a representation to MVC or (ii) how a representation made after a project could retroactively induce reasonable reliance by MVC or constitute an

¹⁶ “And is it your understanding that Meadow Valley was required to promptly notify the engineer of any alleged changes to the contract? Yes.” (R. 1424:552.)

“intentional relinquishment” by UDOT before the project.¹⁷ (R. 1507.) Again, a representation to Southwest by an unspecified UDOT representative after the project could not operate retroactively to waive MVC’s obligation to comply with the contractual notice provisions before the project.

Fourth, MVC argues that “by considering the merits of [MVC’s] claims and deciding those claims on their merits, UDOT waived and is estopped from claiming that [MVC] failed to comply with the notice provisions.” (Resp. Br. at 47.) The trial court found that while the UDOT engineer’s response to MVC’s belated claim “addressed the lack of strict compliance with the contract’s notice requirements, the decision of the UDOT Claims Board of Review makes no mention of lack of notice but addresses only the merits of [MVC’s] claims.” (R. 1513.)

As UDOT pointed out in the opening brief, when MVC submitted its claim to the review board, the UDOT engineer submitted UDOT’s formal response, in which UDOT argued that MVC waived any claim because MVC had failed to comply with the notice provisions. (R. 1513.) For this reason alone, UDOT did not waive this defense. MVC’s only response is that the review board itself is also UDOT (Resp. Br. at 49), a position that would leave UDOT both taking the position that MVC waived its claim (via the engineer) and not taking the position that MVC waived its claim (via the review board), an absurd result. At trial, MVC recognized that because the review board membership includes an independent contractor, any decision “isn’t just a UDOT decision at the claims board of review level.” (R. 1424:588.) MVC was correct at trial.

¹⁷ “To constitute waiver, there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it.” Soter’s, Inc. v. Deseret Fed. Sav. & Loan Ass’n, 857 P.2d 935, 942 (Utah 1993).

If this court were to accept MVC's argument in the response brief, then in the future UDOT must treat the independent review board as part of UDOT and require it to recommend that UDOT deny all claims on procedural grounds to ensure that UDOT does not waive any defenses in subsequent litigation. Review boards were designed to resolve claims without litigation, not to frame claims for litigation.

The only other argument MVC raises is that the UDOT deputy director "adopted" the review board's decision, thereby making it UDOT's position. (Resp. Br. at 48.) The review board recommended that the deputy director deny MVC's claim because the UDOT engineer had correctly interpreted the project specifications. (R. 1424:587-88.) The UDOT deputy director then refused to approve any additional compensation. (R. 153.) A copy of the deputy director's letter is attached at Addendum 2. Contrary to MVC's contention, the letter does not "adopt" the recommendation of the review board. Instead, the letter instructs MVC to contact another UDOT representative for an explanation of the denial of MVC's claim. (Add. 2.) UDOT did not waive its right to enforce the notice provisions when the review board disagreed with MVC on the merits of its claim.

For all of these reasons, MVC's arguments that UDOT is prohibited from enforcing the notice provisions fail as a matter of law.

B. UDOT Did Not Modify the Notice Provisions

UDOT also did not modify the notice provisions to allow a third party's verbal notice to satisfy MVC's written notice obligation. MVC argues that by prohibiting Southwest from ribbon paving, UDOT modified the notice provisions that are triggered when the UDOT engineer alters the project. (Resp. Br. at 49-50.) In other words, the

UDOT engineer's directing Southwest to pave in a manner that altered the project somehow operated to relieve MVC of its obligation to notify UDOT whenever MVC believed the engineer had directed a subcontractor to act in a manner that altered the project. This modification theory makes no sense. Conduct that triggers a notice obligation cannot also modify the notice provision to extinguish the notice obligation.

Moreover, MVC's Rule 30(b)(6) representative testified that MVC understood it had to comply with the notice provisions. (R. 1424:552-55.) MVC's understanding that it had to comply with the notice provisions, coupled with UDOT's similar understanding, undermines any argument that the provision was modified because UDOT and MVC are the only two parties to the general contract. The trial court erred in ruling that UDOT modified the contract.

C. UDOT Is Not Estopped From Enforcing the Notice Provisions

UDOT also is not estopped from enforcing the notice provisions. Under Utah law, estoppel requires "a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted" that induces "reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act or failure to act," and a resulting "injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act."

Youngblood v. Auto-Owners Ins. Co., 2007 UT 28, ¶ 14, 158 P.3d 1088

MVC's argument concerning estoppel is revealing: "UDOT's repeated directives to [Southwest] to proceed with work caused [MVC] to reasonably believe that there was no need to provide written notice to UDOT since UDOT had already made up its mind on the issue of what paving methods it was going to allow." (Resp. Br. at 51.) Not only

does this statement ignore the fact that providing notice results in someone other than the UDOT engineer (the review board and deputy director) reviewing the alleged alteration, it also, again, contradicts the testimony of MVC's Rule 30(b)(6) representative that MVC understood it had to comply with the notice provisions. (R. 1424:552-55.) MVC could not have relied upon UDOT's directives to Southwest in forming a belief that MVC need not comply with the notice provisions because MVC never believed that it need not comply with the notice provisions. The trial court also erred in its estoppel rulings.

Conclusion

This court should reverse on three separate grounds. First, the only plaintiff in this lawsuit, MVC, incurred no damages, and therefore, cannot recover damages. Second, the only breach of contract ruling is that UDOT breached the general contract by altering the project; but the general contract expressly permits UDOT to alter the project. Third, MVC waived any right to additional compensation by failing to comply with the notice provisions in the general contract. And because MVC's Rule 30(b)(6) representative testified that MVC understood that it had to comply with the notice provisions, and failed to do so, the trial court's various rulings that UDOT waived, modified, or is estopped from enforcing the notice provisions fail as a matter of law.

This court should reverse the judgment entered in favor of MVC and remand with instructions to enter judgment in favor of UDOT.

UDOT's Response Brief Regarding MVC's Cross-Appeal

Issue 1: Whether the trial court's interpretation of ambiguous contract language is clearly erroneous where one contracting party (UDOT) interprets the language the same way as the trial court and the other contracting party (MVC) takes no position on the how to interpret the language.

Standard of Review: MVC states that the standard of review is correctness because the trial court's interpretation constitutes a "legal conclusion regarding a contract." (Resp. Br. at 2.) This is incorrect. The trial court found that the language was ambiguous—specifically, "less than clear"—and resolved the ambiguity in favor of UDOT by finding that UDOT's interpretation was "more reasonable."¹⁸ (Resp Br. at 56 (emphasis added).) This court reviews a trial court's interpretation of an ambiguous contract with "all inferences that may be drawn therefrom in a light most supportive of the findings of the trier of fact." Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985).

Issue 2: Whether the trial court clearly erred in rejecting MVC's view that prejudgment interest began accruing on November 11, 2003, even though UDOT made the final payment to MVC that it claims was less than it deserved on July 21, 2005.

Standard of Review: While questions of whether to award prejudgment interest and what rate to apply in calculating prejudgment interest are questions of law, the question of when damages were incurred presents a question of fact reviewed under a clearly erroneous standard. Wilcox v. Anchor Wate Co., 2007 UT 39, ¶ 9, 164 P.3d 353.

¹⁸ The fact that during trial the trial court implied that it considered the language unambiguous is irrelevant. 14th St. Gym, Inc. v. Salt Lake City Corp., 2008 UT App 127, ¶ 16, 183 P.3d 262 ("Regardless of the language used during the hearing, the language in the court's final written order controls.")

Argument

I. The Trial Court Did Not Clearly Err in Interpreting the Thickness Provisions

MVC has filed a cross-appeal challenging the trial court's ruling that UDOT correctly assessed penalties for thickness deficiencies in the paving, deficiencies that diminish the life of the pavement. MVC argues that the contract language governing thickness is ambiguous and the trial court erred in finding UDOT's interpretation of that language "more reasonable." (Resp. Br. at 56.) A copy of the confusing contract provisions related to thickness is attached at Addendum 3.

According to MVC, the language governing thickness that requires pavement to be within 3/8 inch of specifications is most reasonably interpreted to provide that however many layers Southwest laid to reach 5 inches of asphalt, each layer need only be within 3/8 inch of specifications. (Resp. Br. at 52-57.) For example, if MVC had laid the pavement in 3 layers, then the total thickness could have been less than 4 inches—3/8 inch deficiency for each layer—even though the specifications call for a total of 5 inches of pavement. (R. 1424:677.) Yet MVC's counsel conceded that this interpretation "as a practical matter in the field, that does not pass the smell test for me," hardly an endorsement of the reasonableness of MVC's interpretation. (R. 1425:1043.)

The trial court concluded it was "more reasonable" to interpret the thickness language to require the total pavement to be within 3/8 inch of 5 inches.¹⁹ (R. 1515-16.) The trial court's finding is not clearly erroneous.

¹⁹ In trial exhibit 111, which consists of drawings that were part of the general contract, the second drawing indicates that the total thickness of the asphalt must be 5 inches. (R. 1424:677.) As Brandon Squire testified, this 5 inch figure was intended to constitute the "TLA lift." (R. 1424:677.) As the trial court found, the parties agreed that the TLA would be laid in two lifts, a 3 inch lift and then a 2 inch lift. (R. 1515.) This agreement

As a threshold issue, UDOT notes that this court can affirm on a number of alternative grounds demonstrating that the trial court should have dismissed MVC's thickness penalty claim prior to trial. It is well settled that an appellate court may affirm a judgment "sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court." Bailey v. Bayles, 2002 UT 58, ¶ 10, 52 P.3d 1158.

First, when MVC assigned its claim concerning ribbon paving to Southwest, it did not include any claim concerning thickness penalties, and therefore, Southwest has no legal standing to prosecute this claim, which explains why the claim does not appear in MVC's complaint. The assignment defined the assigned claim as stemming from "UDOT's requirement that the block paving method be used." (R. 1184; Add. 1.)

Second, even if MVC had assigned the claim, MVC suffered no damages related to the thickness penalties, as all damages were incurred by Southwest. SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., 2001 UT 54, ¶ 30, 28 P.3d 669 ("because SME's implied warranty claim is an assigned claim, SME may not recover the damages it suffered"). At trial, MVC conceded that it suffered no loss as a result of the thickness penalty. (R. 1424:574 ("as a result of this price reduction did Meadow Valley pass on all these price reductions for thickness deficiency in the end to Southwest? Yes.").)

did not alter the contract's requirement that "no individual subplot can show a deficient thickness of more than 3/8 inch." (R. 1515.) Based upon these findings, the trial court found that "UDOT's interpretation of the allowable deviation applies to the total thickness and not to each individual layer or lift, is the more reasonable interpretation." (R. 1515-16.)

Third, MVC's Rule 30(b)(6) representative testified that MVC formed "no opinion as to whether or how the thickness specification should be interpreted." (R. 1424:574.) If UDOT interpreted the thickness provision to require total pavement within 3/8 inch of the 5 inch requirement, and MVC took no position on the subject, it is difficult to understand how the trial court could have adopted any interpretation other than UDOT's because UDOT and MVC are the only parties to the contract.

Even if each of these alternative grounds fails, however, this court should still affirm. The trial court's resolution of ambiguity in favor of UDOT is reviewed under a deferential standard. Nielsen v. Gold's Gym, 2003 UT 37, ¶ 7, 78 P.3d 600 ("If a contract is deemed ambiguous, and the trial court allows extrinsic evidence of intent, interpretation of the contract becomes a factual matter and our review is strictly limited."). Specifically, a trial court's interpretation of contract ambiguity is reviewed with "all inferences that may be drawn therefrom in a light most supportive of the findings of the trier of fact." Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985).

Here, the trial court "agree[d] with UDOT's interpretation of the contract specification in that the average thickness of all sublots making up a TLA pavement lot cannot show a deficient thickness of more than 3/8" from the 5" total thickness specified for the TLA pavement." (R. 1525.) In the court's findings of fact, the court found as follows: "UDOT's interpretation that the allowable deviation applies to the total thickness and not to each individual layer or lift, is the more reasonable interpretation, as otherwise the potential total deviation in thickness could be multiplied by the number of layers or lifts and could result in a substantial deviation from the contract requirements."

(R. 1515-16.) In other words, MVC could not deviate 3/8 inch for each layer of asphalt, but could only deviate 3/8 inch from the total 5 inch thickness for the finished product.

The trial court's finding is based in part upon the testimony of the UDOT engineer, Brandon Squire, that the price reduction is "based on total thickness specified," or the total 5 inches.²⁰ (R. 1424:606.) Later, Mr. Squire testified that he informed MVC months before any objection to a thickness penalty that the specifications were intended to require measuring thickness based upon "3/8 inch of the total thickness specified which is five inches." (R. 1424:675.) Neither MVC nor Southwest stated that it interpreted the specifications differently—as permitting 3/8 inch deviation for each layer of asphalt instead of the finished product. (R. 1424:636.) Mr. Squire then discussed Exhibit 111, which shows the term "TLA" in the specifications refers to the entire 5 inches, not each layer of payment. (1424:677-78; Trial Ex. 111.) Because the construction drawings attached to the contract indicate that the TLA refers to the entire 5 inches, the 3/8 inch acceptable deviation was intended to apply to the entire 5 inches of pavement.

The trial court then noted that Southwest's representative, Mr. Moehn, testified that a 10% deviation from the total thickness is the industry norm, and applying the 3/8 inch deviation under MVC's interpretation would result in a 15% deviation, something counsel for MVC described as "a big tolerance from a practical standpoint from the field." (R. 1425:1045.) The trial court also noted that MVC had failed to provide any evidence that the thickness specifications had ever been interpreted as MVC was urging.

²⁰ The trial court did not agree with Mr. Squire with regard to certain aspects of the interpretation. (R. 1425:1047.)

(R. 1425:1045-46.) Finally, Mr. Moehn testified that MVC could make up any thickness deficiency in one layer of payment “on subsequent lifts,” which could only be true if the parties intended any thickness penalties to be determined by measuring the thickness of the total paved surface. (R. 1424:899.) Therefore, not only is there factual support for the trial court’s interpretation, there is evidence that Southwest (the only entity to testify in favor of the interpretation advanced by MVC’s counsel) agreed with UDOT.

For all of these reasons, this court should affirm the trial court’s ruling that MVC is not entitled to damages related to UDOT’s assessing a penalty for the thickness of the pavement.

II. The Trial Court Did Not Clearly Err In Rejecting MVC’s Date of Accrual for Prejudgment Interest of November 11, 2003, Because the Final Payment to MVC Under the Contract Did Not Occur Until After July 21, 2005

MVC also argues that the trial court should have awarded prejudgment interest beginning on November 11, 2003, the date Mr. Moehn of Southwest testified that he calculated the increased costs associated with block paving. (Resp. Br. at 60.) The trial court rejected this date and instead found that prejudgment interest began accruing on November 1, 2004, the date MVC first filed a claim seeking additional compensation. (R. 1516.) While the trial court’s finding does not correspond to when MVC incurred the damages, the trial court’s mistake resulted in MVC being awarded too much prejudgment interest, and therefore, there is no basis for this court to reverse the trial court’s award of prejudgment interest via MVC’s cross-appeal.

As MVC points out in the response brief, under Utah law prejudgment interest begins accruing from the date the “damage is complete.” (Resp. Br. at 58.) To apply this standard as MVC urges on appeal, this court first must conclude that (i) MVC incurred

damages, which, as demonstrated above, it did not; and (ii) even though the trial court did not rule that UDOT breached the contract by failing to pay MVC additional compensation, the trial court nonetheless ruled that UDOT breached the contract by failing to pay MVC additional compensation. (Supra at 5-12.) Only if this court holds in favor of MVC on these issues does MVC's cross-appeal concerning prejudgment interest become ripe.

Regardless, to the extent MVC incurred any damages, it did not incur those damages until UDOT either rejected MVC's claim for additional compensation or made the final payment to MVC that did not include additional compensation. UDOT rejected MVC's claim for additional compensation on April 26, 2005. (R. 153.) UDOT made a final payment to MVC after July 21, 2005, the date on which MVC signed a "final estimate" in which it agreed that, other than \$32,650.42 that UDOT subsequently paid, UDOT had paid MVC all compensation it owed MVC. (Trial Ex. 41.) Both of these dates are after the date on which the trial court found that prejudgment interest began accruing, November 1, 2004. (R. 1516.) Therefore, this court should reject MVC's argument that prejudgment interest began accruing on November 11, 2003.

Conclusion


This court should affirm the judgment entered in favor of UDOT. The trial court did not clearly err in resolving any ambiguity in favor of UDOT not only because MVC's representative did not dispute UDOT's interpretation but also because Southwest's representative agreed with UDOT's interpretation. In addition, the trial court did not clearly err in rejecting MVC's position that prejudgment interest began accruing on

November 11, 2003, nearly two years before UDOT refused to pay the additional compensation that MVC claims on appeal constitute its damages.

This court should affirm the judgment entered in favor of UDOT, reverse the judgment in favor of MVC, and remand with instructions to enter judgment in favor of UDOT on all claims.

DATED this 21st day of October, 2009.

SNELL & WILMER L.L.P.



Troy L. Booher
Attorney for Utah Department of Transportation

Certificate of Service

I hereby certify that on the 21st day of October, 2009, two true and correct copies of the foregoing APPELLANT'S REPLY BRIEF AND RESPONSE BRIEF ON CROSS-APPEAL were served via U.S. Mail, postage prepaid, upon the following:

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Addenda

- Addendum 1: Claims Prosecution and Tolling Agreement (“assignment”) dated July 1, 2004
- Addendum 2: Letter dated April 26, 2005 from Carlos M. Braceras, Deputy Director, Utah Department of Transportation, to Cody W. Wilson, counsel for Meadow Valley Contractors, Inc.
- Addendum 3: Excerpts of general contract relating to paving thickness

Tab 1

FILE COPY**CLAIMS PROSECUTION AND TOLLING AGREEMENT**

This Claims Prosecution and Tolling Agreement ("Agreement") is effective the 1st day of July, 2004, by and between MEADOW VALLEY CONTRACTORS, INC. ("MVCI"), FISHER INDUSTRIES, INC. ("Fisher") and LIBERTY MUTUAL INSURANCE COMPANY ("Liberty").

RECITALS

WHEREAS, the Utah Department of Transportation and the State of Utah (collectively referred to hereafter as "UDOT") awarded MVCI the prime contract to complete the project known as the I-215 South Interchange Project IM-NH-215-8(102)10 ("Project");

WHEREAS, MVCI and Fisher entered into a Purchase Agreement to furnish materials and supplies to the Project and, in addition, entered into a Subcontract Agreement to furnish and install paving and related materials in accordance with the Project's plans and specifications. Both the Purchase Agreement and Subcontract Agreement are hereinafter sometimes collectively referred to as "Project Agreements

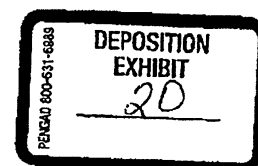
WHEREAS, Fisher has requested an equitable adjustment and additional compensation due to claimed increased costs related to UDOT's requirement that the block paving method be used in the performance of the Project Agreements rather than the continuous wide open ribbon paving method which Fisher sought to use ("Block Paving Claim");

WHEREAS, the Block Paving Claim is further described in the Block Paving Cost Analysis prepared by Michael Moehn and dated November 11, 2003 which Cost Analysis is referred to herein for identification and information purposes with the understanding that said Block Paving Claim may be modified at Fisher's sole discretion. By executing this Agreement, MVCI does not acknowledge that such analysis is accurate or valid;

WHEREAS, MVCI is unable to determine whether the Block Paving Claim has merit, but is willing to permit Fisher to prosecute the Block Paving Claim in the name of MVCI against UDOT under the procedures set forth in the prime contract and in accordance with the terms and conditions set forth herein;

WHEREAS, MVCI and Fisher claim to have claims, cross claims and/or defenses against one another and acknowledge that Fisher has requested additional compensation related to the source, quantity and quality of TLA materials to be used in the construction of the Project as provided for in both Agreements ("Other Claims"). By executing this Agreement, MVCI does not acknowledge responsibility for any such claim of Fisher or acknowledge that such request is valid or timely,

WHEREAS, MVCI and Fisher desire to preserve and toll their Other Claims against each other as provided for herein;



WHEREAS, absent this Agreement, the parties would further assert and prosecute the Block Paving Claim and the Other Claims against one another, and

WHEREAS, the parties desire to avoid litigation among themselves subject to the terms of this Agreement.

AGREEMENT

NOW, THEREFORE, for valuable consideration, the receipt and sufficiency of which are hereby acknowledged, MVCI and Fisher agree as follows:

1. Assignment and Authority to Prosecute Block Paving Claim. MVCI assigns and grants Fisher the right to prosecute and/or negotiate, settle or compromise the Block Paving Claim, by way of lawsuit, administrative, mediation or arbitration proceeding.

2. Tolling.

a. MVCI, Liberty and Fisher, and each for itself, its agents, predecessors, successors and assigns, agree that the running of any statute of limitations imposed by any statute, rule or other time bar defense with regard to the Other Claims shall be suspended until sixty days from the date of the entry of a final settlement or final and non-appealable order by a Court of appropriate jurisdiction with respect to the Block Paving Claim (the "Suspension Period").

b. MVCI, Liberty and Fisher, and each for itself, its agents, successors and assigns, therefore, expressly toll and preserve all of their Other Claims and defenses, and waive and relinquish any right to assert that the time period prescribed by any statute of limitations, whether legal or equitable, has expired.

c. It is the parties' intention that each party hereto shall be in the same position with respect to the Other Claims at the termination of the Suspension Period, including, but not limited to, any applicable statute of limitations or time bar defenses, as on the Effective Date of this Agreement.

3. Block Paving Claim Prosecution.

a. Excluding the Block Paving Claim and the Other Claims, Fisher acknowledges that it has been paid for work performed to date on the Project as required by the Subcontract, except for a final progress payment and retention. These amounts will be released to Fisher in accordance with the Subcontract, and nothing contained herein shall affect Fisher's right to those funds.

b. MVCI hereby assigns and conveys to Fisher the right to prosecute, negotiate, settle, and otherwise pursue the Block Paving Claim against UDOT in the name of MVCI under the terms of the Prime Contract with UDOT. Fisher shall be responsible for taking all steps necessary to prosecute, negotiate, mediate or settle the

Block Paving Claim, and shall retain counsel of its choice. Fisher agrees to pay all related fees, costs, and expenses in connection therewith. MVCI shall assist Fisher in the claims presentation and prosecution by providing applicable documents and testimony of MVCI personnel, provided Fisher shall pay all costs of travel, lodging and meals incurred by MVCI to make such personnel available for testimony.

c. In prosecuting the Block Paving Claim, Fisher agrees to seek the recovery of MVCI's profit, overhead, and bond markups and all taxes that will be due on the Recovery, all of which MVCI is entitled to receive less its share of Fisher's prosecution costs as hereinafter defined ("MVCI Recovery").

d. Fisher shall be entitled to negotiate, settle, or compromise any and all aspects of the Block Paving Claim and any UDOT claimed setoff in connection therewith, and shall further be entitled to receive the amount of any judgment or award made in connection with the Block Paving Claim less the amount of the MVCI Recovery ("Fisher Recovery").

e. Fisher shall be entitled to deduct from the MVCI Recovery 15% of Fisher's Claim preparation and prosecution costs, which shall include Fisher's travel, discovery, attorney's fees, fact, expert and consulting fees, and arbitration, mediation, and/or litigation costs (collectively referred to as the "Prosecution Costs").

f. With respect to the Block Paving Claim, and limited only to said claim, Fisher agrees to be bound to MVCI to the same extent that MVCI is shown to be bound to UDOT, both by the terms and procedures of the Prime Contract and by any and all decisions or determinations made thereunder by any Arbitrator and/or Court. MVCI shall be responsible for any setoffs and claims asserted by UDOT solely against MVCI which do not involve Fisher and which do not arise under or relate to the Block Paving Claim, and agrees to defend at its cost and with its own counsel all such setoffs and claims.

g. This Agreement is intended to resolve all aspects of the Block Paving Claim as between Fisher and MVCI in connection with the Project. In the event Fisher recovers any amounts or does not actually recover any amounts from UDOT on the Block Paving Claim after a disposition on the merits, MVCI and Liberty will have no liability to Fisher with respect to the Block Paving Claim. Fisher, however, shall not be responsible for Counterclaims or setoffs solely against MVCI which do not involve Fisher and which do not arise under or relate to the Block Paving Claim. Fisher agrees to indemnify MVCI from any award of attorneys' fees or costs that may be awarded to UDOT arising under or related to the Block Paving Claim and any counterclaim or setoff for which Fisher may be responsible in whole or in part.

h. MVCI and Fisher both agree that UDOT is solely responsible for amounts, if any, due on the Block Paving Claim and this Agreement is not an admission of any independent liability of either Fisher or MVCI.

4. Authority. The signature of any person to this Agreement shall constitute an acknowledgment, stipulation and warranty by such person that such person has the

authority to bind the entity for which such person purports to sign this Agreement.

5. Breach. In the event of a breach of this Agreement, the prevailing party shall be entitled to collect all expenses incurred in pursuing or defending the action including, but not limited to, all attorneys fees, expert fees and costs incurred in connection with the enforcement of this Agreement.

6. Waiver. No failure to exercise any rights or privileges granted hereunder or to insist upon the full performance of all obligations assumed by the other party hereto shall be construed as waiving any such rights, privileges, obligations, or duties, or as creating any custom contrary hereto. Further, any such waiver, to be enforceable, must be in writing and shall not extend to or operate beyond the express term thereof.

7. Modification. This Agreement contains the entire agreement between the parties and no statement, promises, or inducements made by either party or agent of either party that is not contained in this written contract shall be valid or binding. Furthermore, this Agreement shall supersede all previous communications, representations, or agreements, either verbal or written, between the parties hereto. This Agreement may not be enlarged, modified, or altered in any way except in writing signed by the parties hereto and endorsed hereon.

8. Severability. It is understood and agreed by the parties that if any part, term, or provision of this Agreement is determined by the courts or an arbitrator(s) to be illegal or in conflict with any law of the state where made or any other term herein, the validity of the remaining portions or provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if the contract did not contain the particular part, term, or provision held to be invalid or in conflict.

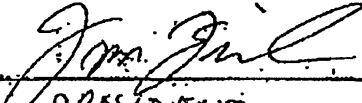
9. Governing Law. This Agreement shall be governed by the laws of the State of Utah, both as to interpretation and performance.

10. Mediation. Any issue or dispute regarding the interpretation or enforcement of this Agreement shall be first mediated in accordance with the American Arbitration Association's Construction Industry Rules of Mediation with each of the parties sharing in one half of the fees and costs incurred in connection therewith. The mediation shall be conducted in Salt Lake City, Utah.

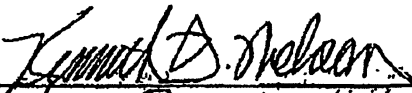
12. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument.

In witness whereof, this Agreement is made effective as of the date first set forth above.

FISHER INDUSTRIES, INC.

By: 
Its: PRESIDENT

MEADOW VALLEY CONTRACTORS, INC.

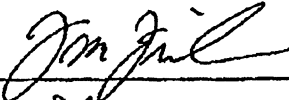
By: 
Its: VICE PRESIDENT

LIBERTY MUTUAL INSURANCE COMPANY

By: _____
Its: _____

In witness whereof, this Agreement is made effective as of the date first set forth above.

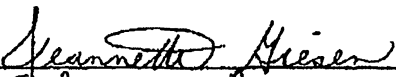
FISHER INDUSTRIES, INC.

By: 
Its: PRESIDENT

MEADOW VALLEY CONTRACTORS, INC.

By: _____
Its: _____

LIBERTY MUTUAL INSURANCE COMPANY

By: 
Its: Surety Specialist

Tab 2



ate of Utah

1 HUNTSMAN, JR.
Governor

RY R. HERBERT
Deputy Governor

DEPARTMENT OF TRANSPORTATION

JOHN R. NJORD, P.E.
Executive Director

CARLOS M. BRACERAS, P.E.
Deputy Director

April 26, 2005

Mr. Cody W. Wilson
Babcock, Scott & Babcock
Eighth Floor
57 West South Temple
Salt Lake City UT 84101

RE: IM-NH-215-9(102)10
I-215, Redwood Road to 300 East
Crack & Seal, Overlay, Widening, Structures, & Noise Walls

Dear Mr. Wilson,

We have received your letter dated Tuesday, April 19, 2005, stating that pursuant to Special Provision Specification Section 00727S – Part 1.25 (D) "Meadow Valley has failed to receive an offer of settlement."

A letter dated February 11, 2005, was sent to Kent B. Scott from the Utah Department of Transportation (UDOT), which outlined the Claims Review Board's ruling. The letter was sent well within the 45 calendar days outlined in Special Provision Specification Section 00727S – Part 1.25(D). The Board's ruling was against Meadow Valley on all three claims issues. The Board's decision requires no offer.

We also received a letter from you dated February 23, 2005, asking for a supplementary and exhaustive explanation concerning the Claims Review Board's ruling. UDOT responded to you in a March 2, 2005, letter saying if you would like further explanation, you should contact Mr. Jim McMinimce at 801-965-4022. Please avail yourself of this offer should you require further clarification.

Again, if you have additional questions, please feel free to contact Mr. McMinimce.

Sincerely,

Carlos M. Braceras, P.E.
Deputy Director

CMB/JCM/la

cc: James C. McMinimce, UDOT Project Development
Darrell Giannonatti, UDOT Construction
Jimmy Holfeltz, UDOT Internal Audit
Jim Beadles, UDOT Attorney
Waylund Ludlow, Claims Review Board, Geneva Rock
Kent B. Scott, Babcock, Scott & Babcock

Tab 3

1.4 ACCEPTANCE

- A. A lot equals the number of tons of HMA placed during each production day. The Department will:
1. Divide each lot into four sublots based on the scheduled production day.
 2. Take random samples behind the paver before any further compaction, and determine random numbers/locations from a random numbers table. ASTM D 3665, UDOT Materials Manual of Instruction Part 8-984: Sampling Methods.
 - a. Take large enough samples for paired-T testing and split with contractor designated lab until testing discrepancies (based on tests outlined in article 3.9 “Dispute Resolution,” paragraph B1, in addition to daily acceptance tests for mix properties) between labs are identified and resolved.
 3. Inform the Contractor of the time and place for the sample not more than 15 minutes prior to the sampling.
 4. Conduct the following tests:
 - a. Asphalt Binder Content : One per subplot using ignition oven. AASHTO T 308
 - b. Aggregate gradation: One test per subplot on the residue of the ignition oven tests. AASHTO T 30.
 - c. VMA: 3 tests per lot. AASHTO T 312
 5. Perform three Rice tests for each lot. Use the average for the lot to determine density of cores taken by the Contractor.
 6. Determine thickness of cores taken by the Contractor.
 7. Add the lot to the previous day’s production if the minimum number of samples cannot be obtained for the final day’s production and evaluate with the appropriate sample size.
 8. Add the lot to the next day’s production if the minimum number of samples cannot be obtained, and evaluate with the appropriate sample size.
 9. Retest the lot if an individual test from a subplot is deemed an outlier based on ASTM E 178.
- B. The Engineer conducts the acceptance testing for asphalt binder content, gradation, VMA, density, and thickness. AASHTO T 30, T 308, PP 28, T 166, ASTM D 3549 For small projects with plan quantities of HMA less than 3000 tons, or for work such as utility work, traffic signals, detours, or lane leveling, the Engineer may elect to accept material based upon visual inspection.
1. When acceptance is intended to be based upon visual inspection, the Engineer reserves the option of conducting any acceptance tests necessary to determine the material and workmanship meets the project requirements.
- C. Obtain samples for density and thickness.
1. Divide the lot into five sublots of approximately equal sizes.

2. Obtain ten cores per lot randomly as instructed, and in the presence of the Engineer within two days after the pavement is placed.
 3. Comply with AASHTO T 166.
 4. If the random location for cores falls within one foot of the edge of the overall pavement section (outer part of shoulders), then move transversely to a point one foot from the edge of the pavement.
 5. Fill core holes with an acceptable asphalt mixture and compact.
 6. The Department will take possession of the cores immediately, and will begin testing the cores within 24 hours for density acceptance.
- D. Density: The target density for determining acceptance and incentive/disincentive is 93.5 percent of maximum Rice density for projects where design overlay thickness is greater than 2 inches. For projects where design overlay thickness is 2 inches or less, target density for determining acceptance and incentive/disincentive is 92.5 percent of maximum Rice density. AASHTO T 209. For small projects with plan quantities of HMA less than 3000 tons, or for work such as utility work, traffic signals, detours, or lane leveling, and when material is to be accepted on the basis of visual inspection per article 1.4 "Acceptance," paragraph B, acceptance for density may be based upon establishing and maintaining a roller pattern to obtain maximum density without over-stressing the pavement.
1. Obtain a minimum of two density determinations on a random basis for each subplot. ASTM D 3665.
 2. When samples for gradation, asphalt binder content and VMA from lots are combined according to Part 3, article 3.9 "Dispute Resolution," in order to obtain an appropriate sample size for evaluation, a lot for density determination is defined as the combined production days.
- E. Thickness: Base acceptance on the average thickness of a lot. $\left\langle \begin{array}{l} \text{A thickness lot} \\ \text{equals a density lot.} \end{array} \right\rangle$ Divide a thickness lot into five sublots equal to density sublots. Thickness acceptance for thin lift projects (2 inches or less) consists of checking thickness regularly with a depth probe during placement and taking corrective action as necessary.
1. Take a minimum of two randomly selected thickness tests within each subplot.
 2. The same core samples taken for density may be used for thickness verification.
 3. The Department accepts a lot when:
 - a. The average thickness of all sublots is not more than 1/2 inch greater nor 1/4 inch less than the total thickness specified.
 - b. No individual subplot shows a deficient thickness of more than 3/8 inch.
 - c. Place additional materials where lots or sublots are deficient in thickness. The minimum depth of compacted surface for correcting deficient thickness is 3 times the nominal maximum aggregate size.
 - d. The Department pays for the quantity of additional material to bring the surface to design grade.

- e. The Department does not pay for the quantity of additional material above the design grade due to the minimum paving thickness required.
 - f. The Engineer may allow excess thickness to remain in place or may order its removal. Remove and replace the entire depth of the course, if it is necessary to remove portions of the course
 - g. The Department pays for 50 percent of the mix in excess of the +1/2 inch tolerance when excess thickness is allowed to remain in place.
 - h. The thickness tolerances established above do not apply to leveling courses. However, check final surfaces in stage construction.

- F. Smoothness Tests
 - 1. Determine acceptance and correct in accordance with Section 01452.

- G. Cease production when any two out of three consecutive lots have a net disincentive or the air voids averaged for each lot are not between 3 and 5 percent for any 2 out of 3 consecutive lots.
 - 1. Before production continues, submit a corrective action plan to the Engineer indicating the changes in production procedures that will be implemented to correct the deficiencies.

- H. The Department pays incentive/disincentive on the assessed quantities of HMA mix according to Table 1 Incentive/Disincentive for Gradation, Asphalt Binder Content and Density or Table 2 Incentive/Disincentive for VMA. Base the incentive/disincentive on Percent Within Limit (PT) computation using Tables 3, 4, and 5. Use lowest single value combined for gradation (each of the sieves) and asphalt binder content.
 - 1. Meet PT of 88 or greater for density for eligibility for incentive in gradation/asphalt binder content and VMA. The Department does not pay incentive for gradation/asphalt binder content and VMA if the Contractor does not meet this condition.
 - 2. For small projects with plan quantities of HMA less than 3000 tons, or for work such as utility work, traffic signals, detours, or lane leveling, and when material is accepted on the basis of visual inspection per article 1.4 "Acceptance," paragraph B, incentives/disincentives do not apply.

- I. The Department rejects the lot if the Percent Within Limits (PT) for any individual measurement is less than 60 percent.

- J. To reduce over-testing of small quantity production days, such as ramps or bridgework, the Engineer may, in concurrence with the Contractor, choose to combine production from several days to form a single lot.

Table 1 Incentive/Disincentive for Gradation, Asphalt Binder Content and Density			
Gradation/Asphalt Binder Content		Density	
PT Based on Min. Four Samples	Incentive/Disincentive (Dollars/Ton)	PT Based on Min. Ten Samples	Incentive/Disincentive (Dollars/Ton)
> 99	0.83	> 99	0.83
96-99	0.67	96-99	0.67
92-95	0.37	92-95	0.37
88-91	0.06	88-91	0.06
84-87	-0.24	84-87	-0.24
80-83	-0.54	80-83	-0.54
76-79	-0.84	76-79	-0.84
72-75	-1.15	72-75	-1.15
68-71	-1.45	68-71	-1.45
64-67	-1.75	64-67	-1.75
60-63	-2.06	60-63	-2.06
<60	Reject	<60	Reject

Table 2 Incentive/Disincentive for VMA	
PT Based on Minimum Three Samples	Incentive/Disincentive (Dollars/Ton)
> 99	0.49
96-99	0.39
92-95	0.18
88-91	-0.03
84-87	-0.24
80-83	-0.44
76-79	-0.64
72-75	-0.85
68-71	-1.06
64-67	-1.27
60-63	-1.47
<60	Reject

Table 3 Upper and Lower Limit Determination	
Parameter	UL and LL
3/4 inch sieve for 1 inch HMA 1/2 inch sieve for 3/4 inch HMA 3/8 inch sieve for 1/2 inch HMA No. 4 sieve for 3/8 inch HMA	Target Value \pm 6.0%
No. 8 sieve	Target Value \pm 5.0%
No.50 sieve	Target Value \pm 3.0%
No. 200 sieve	Target Value \pm 2.0%
Asphalt Binder Content	Target Value \pm 0.35%
VMA Range	Lower Limit: Target Value - 0.75% Upper Limit: Target Value + 1.25%
Density	Lower Limit: Target Value - 2.0% Upper Limit: Target Value + 3.0%

Table 4 Quality Index Values for Estimating Percent Within Limits										
PU/PL	n=3	n=4	n=5	n=6	n=7	n=8	n=10	n=12	n=15	n=20
100	1.16	1.50	1.75	1.91	2.06	2.15	2.29	2.35	2.47	2.56
99	1.16	1.47	1.68	1.79	1.89	1.95	2.04	2.09	2.14	2.19
98	1.15	1.44	1.61	1.70	1.77	1.80	1.86	1.89	1.93	1.97
97	1.15	1.41	1.55	1.62	1.67	1.69	1.74	1.77	1.80	1.82
96	1.15	1.38	1.49	1.55	1.59	1.61	1.64	1.66	1.69	1.70
95	1.14	1.35	1.45	1.49	1.52	1.54	1.56	1.57	1.59	1.61
94	1.13	1.32	1.40	1.44	1.46	1.47	1.49	1.50	1.51	1.53
93	1.12	1.29	1.36	1.38	1.40	1.41	1.43	1.43	1.44	1.46
92	1.11	1.26	1.31	1.33	1.35	1.36	1.37	1.37	1.38	1.39
91	1.10	1.23	1.27	1.29	1.30	1.31	1.32	1.32	1.32	1.33
90	1.09	1.20	1.23	1.24	1.25	1.25	1.26	1.26	1.27	1.27
89	1.08	1.17	1.20	1.21	1.21	1.21	1.21	1.21	1.22	1.22
88	1.07	1.14	1.16	1.17	1.17	1.17	1.17	1.17	1.17	1.17
87	1.06	1.11	1.12	1.12	1.12	1.13	1.13	1.13	1.13	1.13
86	1.05	1.08	1.08	1.08	1.08	1.08	1.08	1.08	1.08	1.08
85	1.03	1.05	1.05	1.05	1.05	1.04	1.04	1.04	1.04	1.04
84	1.02	1.02	1.02	1.01	1.01	1.01	1.00	1.00	1.00	1.00

83	1.00	0.99	0.98	0.97	0.97	0.96	0.96	0.96	0.96	0.96
82	0.98	0.96	0.95	0.94	0.94	0.93	0.93	0.92	0.92	0.92
81	0.96	0.93	0.92	0.91	0.90	0.90	0.89	0.89	0.89	0.88
80	0.94	0.90	0.88	0.87	0.86	0.86	0.85	0.85	0.85	0.85
79	0.92	0.87	0.85	0.84	0.83	0.83	0.82	0.82	0.82	0.81
78	0.89	0.84	0.82	0.81	0.80	0.79	0.79	0.78	0.78	0.78
77	0.87	0.81	0.79	0.78	0.77	0.76	0.76	0.75	0.75	0.75
76	0.84	0.78	0.76	0.75	0.74	0.73	0.72	0.72	0.72	0.72
75	0.82	0.75	0.73	0.72	0.71	0.70	0.69	0.69	0.69	0.68
74	0.79	0.72	0.70	0.68	0.67	0.67	0.66	0.66	0.66	0.65
73	0.77	0.69	0.67	0.65	0.64	0.64	0.62	0.62	0.62	0.62
72	0.74	0.66	0.64	0.62	0.61	0.61	0.60	0.59	0.59	0.59
71	0.71	0.63	0.60	0.59	0.58	0.58	0.57	0.56	0.56	0.56
70	0.68	0.60	0.58	0.56	0.55	0.55	0.54	0.54	0.54	0.53
69	0.65	0.57	0.55	0.54	0.53	0.52	0.51	0.51	0.51	0.50
68	0.62	0.54	0.52	0.51	0.50	0.50	0.48	0.48	0.48	0.48
67	0.59	0.51	0.49	0.48	0.47	0.47	0.46	0.45	0.45	0.45
66	0.56	0.48	0.46	0.45	0.44	0.44	0.43	0.42	0.42	0.42
65	0.53	0.45	0.43	0.42	0.41	0.41	0.40	0.40	0.40	0.39
64	0.49	0.42	0.40	0.39	0.38	0.38	0.37	0.37	0.37	0.37
63	0.46	0.39	0.37	0.36	0.35	0.35	0.35	0.34	0.34	0.34
62	0.43	0.36	0.34	0.33	0.33	0.33	0.32	0.31	0.31	0.31
61	0.39	0.33	0.31	0.30	0.30	0.30	0.29	0.29	0.29	0.28
60	0.36	0.30	0.28	0.27	0.26	0.26	0.25	0.25	0.25	0.25
<60	≤0.35	≤0.29	≤0.27	≤0.26	≤0.25	≤0.25	≤0.24	≤0.24	≤0.24	≤0.24

Enter table in the appropriate sample size column and round down to the nearest value.

Table 5 Definitions, Abbreviations, and Formulas for Acceptance	
Term	Explanation
Target Value (TV)	The target values for gradation, asphalt binder content and VMA are given in the Contractor's volumetric mix design. See article 1.4, D., line E, for density target values.
Average (AVE)	The sum of the lot's test results for a measured characteristic divided by the number of test results; the arithmetic mean.
Standard Deviation (s)	The square root of the value formed by summing the squared difference between the individual test results of a measured characteristic and AVE, divided by the number of test results minus one. This statement does not limit the methods of calculations of s; other methods that obtain the same value may be used.
Upper Limit (UL)	The value above the TV of each measured characteristic that defines the upper limit of acceptable production. (Table 3)
Lower Limit (LL)	The value below the TV of each measured characteristic that defines the lower limit of acceptable production (Table 3)
Upper Quality Index (QU)	$QU = (UL - AVE)/s$
Lower Quality Index (QL)	$QL = (AVE - LL)/s$
Percentage of Lot Within UL (PU)	Determined by entering Table 4 with QU.
Percentage of Lot Within LL (PL)	Determined by entering Table 4 with QL.
Total Percentage of Lot (PL) Within UL and LL (PT)	$PT = (PU + PL) - 100$
Incentive/Disincentive	Determined by entering Table 1 and 2 with PT or PL.

All values for AVE, s, QU, and QL will be calculated to two decimal place accuracy that will be carried through all further calculations. Rounding to lower accuracy is not allowed.

PART 2 PRODUCTS

2.1 HMA ASPHALT BINDER

- A. Refer to Special Provision 02742S: Project Specific Surfacing Requirements
- B. Asphalt material: Refer to Section 02745
- C. Sampling procedure: UDOT Materials Manual of Instruction Part 8-209
- D. Asphalt Binder Management Plan: UDOT Materials Manual of Instruction Part 8-209

2.2 NATURAL ASPHALT MATERIAL

- A. Use a blend of 75% PG 58-34 as per Section 02745, and 25% natural asphalt as defined by the following:
 - 1. Natural Asphalt: Must be a naturally occurring asphalt from a reliable source that has been field tested and used on previous highway projects for several years and has the following characteristics:

Specific Gravity (ASTM D-70)	1.3 Minimum
Penetration (ASTM D-5)	1 to 4
Mineral Matter (Reduced to Ash)	35% to 39%
Softening Point (RB) (ASTM D-36)	190°F - 210°F

- B. Meet AASHTO T 40
- C. Refer to UDOT Materials Sampling and Testing Manual.
- D. Sampling procedure: UDOT Materials Manual of Instruction Part 8-209.
- E. Asphalt Binder Management Plan: UDOT Materials Manual of Instruction Part 8-209

2.3 AGGREGATE

- A. Refer to the Minimum Test Requirements.
- B. Crusher processed virgin aggregate material consisting of crushed stone, gravel, or slag. Conform to Section 02969 for recycled mixes.